S. Ct. U.S.
(1)
061054 JAN 29 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

ROBERT JOSEPH WHEELER,

Petitioner,

v.

MISSOURI DIRECTOR OF REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EASTERN DISTRICT OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

W. BEVIS SCHOCK
7777 Bonhomme Avenue
Suite 2350
Saint Louis, Missouri 63105
(314) 726-2322

Attorney for Petitioner

206255

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner was arrested for DWI, even though the officer never gave him the standard roadside tests.

At the trial in his administrative suspension case, that is, his challenge of a 30 day suspension of his driver's license administered by Respondent, the officer did not appear due to long-term illness. Petitioner asserted that the due process demanded that the officer appear and explain his observations.

The court rejected that argument, reviewed the police report only, and found probable cause for the arrest.

Petitioner appealed. The Court of Appeals for the Eastern District of Missouri ruled against Petitioner on the probable cause issue, but did so in a "Memorandum Opinion." The opinion stated on its cover as follows:

> THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT.

(Capitalization and underlining in original).

Petitioner filed a Motion to Publish the opinion, but that Motion was denied. Petitioner asked the Missouri Supreme Court to hear the case but the Missouri high court "denied transfer". This writ is therefore on certiorari to the Court of Appeals for the Eastern District of Missouri.

Three Questions are Presented:

1. Is there a due process violation when a court finds probable cause for a DWI arrest when the officer made subjective findings but not objective findings of intoxication and did not appear at trial to explain his subjective findings?

2. May the Missouri appellate court issue a "Memorandum Opinion" which is (a) "not uniformly available" (b) "not [to] be reported", and (c) not available for citation in other cases, or does issuance of an opinion in such manner violate the First Amendment guarantee of freedom of speech?

3. When the Missouri Court of Appeals for the Eastern District issued 908 civil and criminal opinions in 2006, of which 60% were unpublished, and when the Missouri Supreme Court in 2006 ruled on 15 appeals in cases in which that Court of Appeals issued an opinion, and only 3 of the 15, or 20% were unpublished[1], did the Court of Appeals violate Petitioner's right to due process in making his decision unpublished, because that choice significantly reduced Petitioner's chance to be heard by the Missouri Supreme Court?

---

1. Due to timing issues the cases in the two courts were not the same set of cases.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

TABLE OF APPENDICES vi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

Constitutional Provisions Involved 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 6

I. REVIEW IS WARRANTED TO RESOLVE THE DEGREE OF DUE PROCESS REQUIRED IN A DWI ADMINISTRATIVE SUSPENSION CASE WHEN (a) THE OFFICER DOES NOT TESTIFY AND (b) THERE ARE NO OBJECTIVE RESULTS FROM THE STANDARD ROADSIDE TESTS 6

Contents

Page

II. REVIEW IS WARRANTED TO RESOLVE WHETHER AN APPELLATE COURT MAY ORDER THAT ONE OF ITS DECISIONS MAY NOT BE REPORTED, THAT THE DECISION SHALL NOT BE UNIFORMLY AVAILABLE, AND THAT FUTURE LITIGANTS SHALL NOT CITE IT 8

III. REVIEW IS WARRANTED TO RESOLVE WHETHER THE MUCH LOWER PERCENTAGE CHANCE OF A MEMORANDUM OPINION BEING HEARD BY THE MISSOURI SUPREME COURT, AS MEASURED AGAINST THE PERCENTAGE CHANCE OF A PUBLISHED OPINION BEING HEARD BY THE MISSOURI SUPREME COURT, INDICATES THAT IN CHOOSING TO ISSUE ITS OPINION IN MEMORANDUM FORM THE COURT OF APPEALS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS. 13

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Boddie v. Connecticut, 401 U.S. 371 (U.S. 1971) .. 14

Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (U.S. 1980) 9, 10, 11

Cox v. New Hampshire, 312 U.S. 569 (1941) 10

Cutter v. Wilkinson, 544 U.S. 709 (2005) 10

Greer v. Spock, 424 U.S. 828 (1979) 10

TABLE OF APPENDICES

Page

Appendix A — Memorandum And Order Of The Missouri Court Of Appeals, Eastern District, Division Two Filed July 11, 2006 ..... 1a

Appendix B — Judgment Of The Circuit Court Of The City Of St. Louis, Missouri Filed September 14, 2005 ..... 11a

Appendix C — Order Of The Supreme Court Of Missouri Dated October 31, 2006 ..... 14a

Appendix D — Opinion Of The United States Court Of Appeals For The Eighth Circuit Filed August 22, 2000 ..... 16a

Appendix E — Statistical Table Showing The Missouri Supreme Court's Rate Of Review Of Published V. Non-Published Opinions From The Missouri Court Of Appeals For The Eastern District Prepared By Samir Kaushik, Washington University Law School, Class Of 2008 ..... 28a

Appendix F — Explanation Of Methodology Of Creation Of Appendix D. Prepared By Samir Kaushik, Washington University Law School, Class Of 2008 ..... 29a

OPINION BELOW

The case number in the Missouri Court of Appeals for the Eastern District is ED87132. The opinion is not reported, although there appears at 202 S.W.3d 624 an order stating that a memorandum opinion was issued to the parties.

The case number in the Missouri Supreme Court is SC88021. That denial of transfer is not reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution.

STATEMENT OF THE CASE

1. St. Louis resident Robert Joseph Wheeler, Jr. was parking his car and clipped another car's mirror. A police officer came to the scene.

The officer suspected that Mr. Wheeler was intoxicated, but the officer did not give Mr. Wheeler what are known as the "standard roadside tests", that is, the walk and turn test, the one-legged stand test, the horizontal gaze nystagmus test, or the portable breath test.

The officer instead found probable cause to arrest Petitioner because Petitioner had a "strong odor of alcoholic

beverage", "watery and bloodshot eyes", "swaying balance/ walking", "swaying turning", and "slurred speech".

In addition to charging Petitioner with the criminal offense of DWI, the officer initiated a civil "administrative suspension", which is a 30 day driver's license suspension given in Missouri and most other states when (a) there is probable cause for the arrest for DWI, and (b) the subject blows above the legal limit. Respondent Missouri Director of Revenue administers such suspensions.

In his criminal DWI case Petitioner plead guilty to the reduced charge of careless and imprudent driving.

In his civil administrative suspension case Petitioner exhausted his administrative remedies and then filed for a trial de novo in the Circuit Court. Under Missouri procedure and the posture of the case, the only issue for the trial court was whether the officer had probable cause for the arrest.

Unfortunately, by the time of trial the responding police officer had suffered a severe stroke. He is not expected to speak or walk again.

In these cases the Missouri courts have held that it is legal and proper to admit a DWI police report as a business record and to draw conclusions therefrom regarding probable cause and the results of the breath test. This may occur without testimony from the officer.

In Petitioner's trial the court did exactly that and concluded that the above listed factors constituted probable cause for the arrest.

Petitioner challenged the trial court's ruling through the Missouri appellate system. He argued that probable cause for a DWI arrest cannot be established when the officer neither gives the standard roadside tests at the scene nor provides at trial an explanation for why he did not give those tests, and that any finding of probable cause without such protections would violate his right to due process.

At the Missouri intermediate appellate court level, that is, at the Court of Appeals for the Eastern District of Missouri, the court ruled against Petitioner through what is known as a "Memorandum Opinion". The seven page opinion stated on page one as follows:

> THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT.

(Capitalization and underlining in original).

The court issued a concurrent order which reads:

> PER CURIAM.
>
> Appellant, Robert J. Wheeler, appeals from the judgment of the Circuit Court of the City of St. Louis upholding the suspension of his driving privileges. We affirm.
>
> We have reviewed the briefs of the parties and the record on appeal. As an extended opinion would serve no jurisprudential purpose, we affirm the

> judgment pursuant to Rule 84.16(b). We have, however, provided a memorandum opinion for the use of the parties only setting forth the reasons for our decision.

Petitioner filed at the Court of Appeals two customary Missouri post opinion motions: a "Motion for Rehearing" and an "Application for Transfer [by the Court of Appeals to the Supreme Court]".

Of more significance to this action, Petitioner also filed in the Court of Appeals a "Motion to Publish". A Motion to Publish is authorized by Missouri Rule of Civil Procedure 84.17(a)(3). Pursuant to that Rule a party whose case has been resolved by a Memorandum Opinion may ask the court to publish the opinion.

The Court of Appeals denied the Motion for Rehearing, the Application for Transfer, and the Motion to Publish.

Petitioner then sought review by the Missouri Supreme Court on both the probable cause issue and the Motion to Publish issue.

The Missouri high court summarily declined to take the case and issued no substantive rulings.

The Missouri Court of Appeals then issued its mandate. At that point Petitioner was out of options in Missouri.

There is no question that in Missouri, as in all other states, drunk driving is a highly controversial issue.

Petitioner suggests that his outcome through the appellate process may have been affected by the Court of Appeals' exercise of its option to refuse to "go public" and "to be counted" in its decision in his case.

2. Petitioner timely filed for his original administrative review of his 30 day suspension in early April 2005. Respondent conducted a "telephone hearing" on May 31, 2005. The hearing officer ruled against Petitioner on June 10, 2005.

3. Petitioner filed for a trial de novo in the Circuit Court for the City of St. Louis on June 23, 2005. The case came on for trial on September 12, 2005. The trial court ruled against Petitioner on September 14, 2005.

4. Petitioner filed a Notice of Appeal. The Court of Appeals for the Eastern District of Missouri issued its Memorandum Opinion on July 11, 2006. Petitioner filed a "Motion for Rehearing", an "Application for Transfer", and a "Motion to Publish" on July 24, 2006. The court denied all three Motions on August 31, 2005.

5. Petitioner filed an Application for Transfer in the Missouri Supreme Court on September 14, 2005. The court denied the application on October 31, 2006. (That date started the clock running on the 90 days to file this Petition for Certiorari).

6. The Court of Appeals issued its mandate on November 2, 2006.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE DEGREE OF DUE PROCESS REQUIRED IN A DWI ADMINISTRATIVE SUSPENSION CASE WHEN (a) THE OFFICER DOES NOT TESTIFY AND (b) THERE ARE NO OBJECTIVE RESULTS FROM THE STANDARD ROADSIDE TESTS

Due process requires some objectivity when a probable cause case is decided on a police report admitted as a business record.

Missouri's admission of DWI police reports in such cases must therefore be based on a presumption of such objectivity.

In a routine case the officer administers objective standard roadside tests. He counts the seconds before the subject puts his foot down, counts the steps the subject takes on the line before he tumbles, etc. The observations are objective.

In this case, however, the findings of indicia of intoxication can only be found in the officer's checking of boxes in the police report on issues which are inherently subjective. The boxes checked are for: "strong odor of alcoholic beverage", "watery and bloodshot eyes", "swaying balance/walking", "swaying turning", and "slurred speech".

Petitioner suggests that because each of those observations is subjective, they lacked sufficient reliability to be admitted into evidence as a business record.

(The administrative suspension process is a civil proceeding. To this observer, however, such a hearing appears to involve denial of a citizen's right to drive, and therefore appears related to punishment. But that is an issue for another day).

Casual empiricism tells us that many, many of our nation's citizens drive their cars home from parties and other events on the edge of intoxication. The police stop a significant portion of such drivers, and many of those stopped become entangled in the DWI machinery.

Virtually all the states have an administrative suspension procedure similar to Missouri's. Many subjects challenge the administrative suspension. Additionally, many trials occur when the officer is absent, and many cases are decided based on observations in a police report.

In light of the pervasiveness of these interactions between the police, the citizenry, and the judicial system, the question of the degree of due process required in the administrative suspension portion of a DWI would seem to warrant this court's attention.

Particularly, it is significant for all to know whether, when the officer makes no objective findings in the course of administering the standard roadside tests, the officer must come to court and explain his otherwise subjective findings.

II. REVIEW IS WARRANTED TO RESOLVE WHETHER AN APPELLATE COURT MAY ORDER THAT ONE OF ITS DECISIONS MAY NOT BE REPORTED, THAT THE DECISION SHALL NOT BE UNIFORMLY AVAILABLE, AND THAT FUTURE LITIGANTS SHALL NOT CITE IT

The Court of Appeals issued its decision as an "Order", with a "Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b)". To repeat from above, page one of the opinion states:

> THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT.

(Capitalization and underlining in original).

Petitioner first concedes that the Missouri constitution Art. 5, § 12 allows Memorandum Decisions (a/k/a "Memorandum Opinions"), "pursuant to Supreme Court rule":

> The opinions of the supreme court and court of appeals and all divisions or districts of said courts shall be in writing and filed in the respective causes, and shall become a part of the records of the court, be available for publication, and shall be public records. The supreme court and the court of appeals may issue memorandum decisions or dispose of a cause by order pursuant to and as authorized by supreme court rule.

Petitioner next concedes that Missouri Rule of Civil Procedure 84.16(b) allows Memorandum Opinions and is a properly enacted Missouri Supreme Court Rule. Petitioner additionally concedes that the Court of Appeals decision was in compliance with the Rule.

Petitioner next and lastly concedes that the Missouri Sunshine Law, RSMo. 610.010(4) appears to exclude the judicial branch while that branch acts in its judicial capacity.

Nevertheless, Petitioner suggests that under the First and Fourteenth Amendment, Memorandum Opinions simply are not right.

In ***Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530 (U.S. 1980)** this court provided a "law school primer" on free speech. The case related to an attempt by New York state to stop Consolidated Edison from inserting issue advocacy flyers in its electric bills to its customers.

The Court first broadly explained the purpose of the First Amendment guarantee of free speech as that guarantee is applied to the states:

> The First and Fourteenth Amendments guarantee that no State shall abridg[e] the freedom of speech. Freedom of speech is indispensable to the discovery and spread of political truth, and the best test of truth is the power of the thought to get itself accepted in the competition of the market. The First and Fourteenth Amendments remove governmental restraints from the arena of public discussion, putting the decision as to what

> views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.
>
> This Court has emphasized that the First Amendment embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. ***Consolidated Edison***, 447 U.S. 530, 534-535. (Citations omitted).

The court then outlined the parameters of reasonable restrictions on first amendment rights, including:

> Whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

In this matter it appears that none of the parameters apply. The time, place and manner restrictions generally apply to such issues as locations of parades, etc., ***Cox v. New Hampshire*, 312 U.S. 569 (1941)**. The subject matter regulations generally apply to such issues as political speeches on military bases, ***Greer v. Spock*, 424 U.S. 828 (1979)**. The narrowly tailored means of serving a compelling state interest generally apply to such issues as non-mainstream religious observances within the prison system, ***Cutter v. Wilkinson*, 544 U.S. 709 (2005)**. This case has none of those elements.

The ***Consolidated Edison*** case continues at 447 U.S. 537:

> The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

It appears to Petitioner that the Missouri Court of Appeals, in prohibiting citation of the Petitioner's case, has cut against the grain of all of this First Amendment jurisprudence.

Surely judicial decisions rank highly in importance in the pantheon of government pronouncements. How can the Missouri Court of Appeals constitutionally tell the citizenry that a decision shall not be published, that it is not uniformly available, and that it cannot be cited?

It is significant to note that a WestLaw search produces only the order stating that the opinion has been issued to the parties. So even though we now live in the "everything is on the internet era", the action of Missouri Court of Appeals in the case involving Robert Joseph Wheeler, Jr. is not available in that medium.

Consolidated Edison has strong parting words at 447 U.S. 537-538:

> If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth. (Citations omitted).

The Court of Appeals appears to be doing exactly that.

Petitioner notes, as stated above, that he has concern that the Court's use of the Memorandum Opinion form may have affected the Court's decision to throw cold water on his due process rights. That is a scary thought.

Petitioner further notes that this concern would seem particularly well placed when the subject is the highly politicized subject of drunk driving. On the one side are the spirit makers, libertarians, and the historic rights of citizens in their interactions with the law. On the other side are the Mother's Against Drunk Driving, the citizenry's reasonable demand that its politicians, police and judges keep drunks off the road, and the country's historic puritanical roots.

But even drunk drivers have rights. If the Missouri Court of Appeals wants to lean toward approving a limitation of due process, the court ought to at least do it in the clear light of day.

Petitioner concludes by noting that this is not a small problem. In 2006 the Missouri Court of Appeals for the Eastern District issued 908 civil and criminal opinions, of which 547, that is, a 60% majority, were unpublished.

III. REVIEW IS WARRANTED TO RESOLVE WHETHER THE MUCH LOWER PERCENTAGE CHANCE OF A MEMORANDUM OPINION BEING HEARD BY THE MISSOURI SUPREME COURT, AS MEASURED AGAINST THE PERCENTAGE CHANCE OF A PUBLISHED OPINION BEING HEARD BY THE MISSOURI SUPREME COURT, INDICATES THAT IN CHOOSING TO ISSUE ITS OPINION IN MEMORANDUM FORM THE COURT OF APPEALS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS.

As stated above, in 2006 the Missouri Court of Appeals for the Eastern District issued 908 opinions, of which 547, that is, a majority of 60%, were unpublished. The Missouri Supreme Court heard 15 cases in 2006 for which that Court of Appeals had previously issued an opinion.[2] See appendix E and F, respectively showing the raw data and an explanation for the methodology of the data collection.[3]

In the course of its case selection, however, the Missouri Supreme Court focused its attention on published opinions. In fact, of the 15 Eastern District opinions for which the

---

2. In Missouri when the Missouri Supreme Court accepts transfer of a case in which the Court of Appeals has previously issued an opinion, the Court of Appeals opinion becomes a nullity. The Supreme Court then directly reviews the actions of the trial court.

3. Many Missouri Supreme Court opinions were in cases in which there was no opinion by the Court of Appeals. Examples include writs, direct appeals of challenges to statutes, and death penalty matters. It is also significant to note that due to timing the 15 relevant opinions were not all related to opinions the Court of Appeals issued in 2006.

Missouri Supreme Court accepted transfer in 2006, 12 were published and 3 were unpublished. Thus the ratio of review of published to unpublished opinions was 4 to 1. (Petitioner admits that as yet he has no data on the percentage of cases with published v. unpublished cases in which the losing litigants sought review by the Missouri Supreme Court, and that issue could affect the analysis).

On the basis of present analysis, however, a litigant was four times more likely to have his case reviewed by the Supreme Court of Missouri if the Court of Appeals issued its opinion in the form of a published opinion.

In ***Boddie v. Connecticut*, 401 U.S. 371 (U.S. 1971)** this court discussed the due process rights to access to the courts. The context was review of a state law requiring indigents to pay filing fees for their divorce actions. The court stated:

> Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard ***Id.*, 401 U.S. at 377**.
>
> The right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals. ***Id.* 401 U.S. at 379-380.**
>
> [A particular procedure] may offend due process because it operates to foreclose a particular party's opportunity to be heard. ***Id.***

In Missouri the Court of Appeals makes its own determination, on case by case basis, about whether to issue an opinion as published or unpublished. The practical effect of the Court's choice to issue its opinion as unpublished in any given case, apparently however, is to significantly reduce the litigant's chance for review by the Missouri Supreme Court.

In choosing to issue opinions in unpublished form, the Court of Appeals would therefore seem to be at the edge of, and perhaps over the edge of, depriving the affected litigants, particularly including Petitioner, of a due process right to a meaningful opportunity to be heard at the next level of the system.

Petitioner suggests that this possible deprivation of a due process right warrants review.

For interest's sake Petitioner has included in Appendix D a spectacular opinion on Unpublished Decisions written by the late Judge Richard S. Arnold of the Eighth Circuit. That case is Anastasoff v. United States of America, No. 99-3917EM. Judge Arnold used the opinion to instruct us all in the role of the judicial opinion in the historic development of the common law, and to toss out the Eighth Circuit's local rule allowing Memorandum Decisions.

As it turned out, however, that case was mooted by settlement a few days after the opinion was issued, and the Eighth Circuit has never returned to the issue.

Finally, one should note that in the Eighth Circuit one may cite a Memorandum Opinion on the condition that a litigant can find nothing else on point to cite.

In Missouri the prohibition on citation appears to be absolute. Petitioner suggests, however, that in each case there is an unjustified restriction on speech, and so between the two Rules there is only a distinction without a difference.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

W. BEVIS SCHOCK
7777 Bonhomme Avenue
Suite 2350
Saint Louis, Missouri 63105
(314) 726-2322

Attorney for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM AND ORDER OF THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DIVISION TWO FILED JULY 11, 2006

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED87132

ROBERT J. WHEELER,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Circuit Court of the City of St. Louis

Honorable Elizabeth Byrne Hogan

FILED: July 11, 2006

Before Gary M. Gaertner, Sr., P.J., George W. Draper III, J., and Kenneth M. Romines, J.

PER CURIAM.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

Appendix A

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION

Appellant, Robert J. Wheeler ("Wheeler"), appeals from the judgment of the Circuit Court of the City of St. Louis upholding the suspension of his driving privileges. We affirm.

On October 24, 2004, Wheeler was driving a vehicle near 4160 Fillmore in the City of St. Louis when he "clipped" the mirror of a parked car ("the accident"). Officer Donald E. Koehne ("Officer Koehne") responded to the scene of the accident. When Officer Koehne arrived at the scene of the accident, Wheeler was still present. Officer Koehne discovered the driver's side mirror of the parked car was broken and that there were long scratches on the driver's side of the vehicle. Officer Koehne also observed that there was minor damage to the front passenger side of Wheeler's vehicle.

During his investigation of the accident, Officer Koehne noticed a strong odor of alcohol on Wheeler's breath. In addition, Wheeler's eyes were bloodshot and watery, and his speech was slurred. Wheeler also had difficulty walking and maintaining his balance.

Appendix A

Officer Koehne asked Wheeler to perform two field sobriety tests: an alphabet test and a counting test. In performing the alphabet test, Wheeler missed the letters S. T, U, and V. For the counting test, Officer Koehne asked Wheeler to count from fifty to thirty-five. Wheeler started counting at the number forty-eight, missed numbers forty and thirty-nine, and stopped counting at the number thirty-three.

Officer Koehne arrested Wheeler for driving while intoxicated. Wheeler was transported to the traffic safety division, where he consented to taking a breathalyzer test. Wheeler's blood alcohol content ("BAC") tested at .129%, exceeding the legal limit of .08%. Subsequently, Respondent, Director of Revenue ("the DOR"), suspended Wheeler's driving privileges.

On June 23, 2005, Wheeler filed a petition for trial de novo. The trial court held a trial de novo on September 12, 2005. Wheeler submitted into evidence a subpoena of Officer Koehne, and a letter from the police department explaining that Officer Koehne was unavailable to testify due to severe health problems. The DOR submitted their case on the record, which included an alcohol influence report, the accident report, and the results of Wheeler's breathalyzer test.

On September 14, 2005, the trial court entered a judgment upholding the suspension of Wheeler's driving privileges. The court found there was probable cause to arrest Wheeler for driving while intoxicated and that Wheeler had a BAC that exceeded the legal limit. This appeal by Wheeler followed.

Appendix A

We will affirm the trial court's judgment unless it is unsupported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Fainer v. Director of Revenue,* 123 S.W.3d 303, 305 (Mo.App.E.D. 2003). In our review, we accept as true all evidence and inferences which are favorable to the judgment and disregard all contrary evidence and inferences. *Id.*

In order to properly suspend a driver's license pursuant to section 302.505, RSMo 2000,[1] the director of revenue must prove by a preponderance of the evidence that: (1) there was probable cause to arrest the driver for driving while intoxicated; and (2) the driver's BAC exceeded the legal limit at the time of the arrest. *Id.* at 305-06. Once the director of revenue makes this prima facie showing, the driver has the opportunity to offer rebuttal evidence regarding the validity of the director of revenue's case. *Id.* at 306.

In Wheeler's sole point on appeal, he contends the trial court erred in upholding the suspension of his driving privileges because the DOR failed to make its prima facie showing that the suspension was proper. Wheeler concedes that his BAC exceeded the legal limit at the time of his arrest. Thus, the only issue is whether there is sufficient evidence in the record to support the trial court's finding that there was probable cause to arrest Wheeler for driving while intoxicated.

---

1. All statutory references are to RSMo 2000, unless otherwise indicated.

Appendix A

There is probable cause to arrest a driver for the offense of driving while intoxicated when an officer observes the driver unusually or illegally operating a motor vehicle, and he observes indications of intoxication when he comes in contact with the driver. *Brown v. Director of Revenue,* 85 S.W.3d 1, 4 (Mo.banc 2002). An officer can rely on circumstantial evidence of driving when actual driving is not observed. *Fainer,* 123 S.W.3d at 306. In determining whether an officer had probable cause, we must view the situation as it would have appeared to a prudent, cautious, and trained officer. *Brown,* 85 S.W.3d at 4.

We will discuss Wheeler's third sub-point on appeal before discussing his first and second sub-points on appeal.

In his third sub-point on appeal, Wheeler argues that the DOR failed to show there was probable cause to arrest him for driving while intoxicated because an inconsistency within Officer Koehne's reports "makes the entire [police] report inherently unreliable."

Section 302.312.1 provides that copies of the director of revenue's records "properly certified by the appropriate custodian . . . shall be admissible as evidence in all courts of this state and in all administrative proceedings." Section 302.312.1. When a driver's license suspension case is submitted solely upon a written record, there is a risk of an inability to explain discrepancies. *Mitts v. Director of Revenue,* 57 S.W.3d 357, 359 (Mo.App.E.D. 2001). Thus, caution should be exercised when this occurs. *Id.* Moreover, there will be instances in which we are justified in finding that the written record does not establish a prima facie

showing, such as when the record has a number of unexplained inconsistencies. *Helton v. Director of Revenue,* 944 S.W.2d 306, 310 (Mo.App.W.D. 1997).

In this case, the DOR submitted Wheeler's driver's license suspension solely upon a certified written record,[2] which included an alcohol influence report, the accident report, and the results of Wheeler's breathalyzer test. The only inconsistency in the record cited by Wheeler is that the alcohol influence report indicates that Wheeler refused to take a breathalyzer test, while the accident report shows that Wheeler consented to a breathalyzer test. However, Wheeler resolves this inconsistency himself, admitting that he took a breathalyzer test. Moreover, Wheeler does not argue that he was forced to take the breathalyzer test. Accordingly, we cannot find that this one inconsistency, resolved by Wheeler, makes the entire police report inherently unreliable. Sub-point denied.

We will now discuss Wheeler's first and second sub-points on appeal.

In his first sub-point on appeal, Wheeler argues that the DOR failed to establish there was probable cause to arrest him for driving while intoxicated because Officer Koehne did not administer standardized field sobriety tests.

There are three field sobriety tests standardized on the Missouri Alcohol Influence Report: (1) the one leg stand test, (2) the walk-and-turn test, and (3) the gaze nystagmus test.

2. We note that Wheeler does not contend that the DOR's records were improperly certified.

See Dillon v. Director of Revenue, 999 S.W.2d 319, 320 (Mo.App.W.D. 1999). Non-standardized field sobriety tests include the alphabet test and a counting test. *See Norris v. Director of Revenue for State,* 156 S.W.3d 786, 787 (Mo.App.W.D. 2005). It is not mandatory for an officer to administer any field sobriety tests. *See id.* at 788. Field sobriety tests merely aid an officer in his attempt to determine where there is probable cause to arrest a driver for the offense of driving while intoxicated. *Id.*

In this case, Officer Koehne was not required to administer any field sobriety tests. Yet, Officer Koehne administered two non-standardized field sobriety tests, an alphabet test and a counting test, both of which Wheeler failed. The written record also reveals that Wheeler admitted hitting a parked car. In addition, there was a strong odor of alcohol on Wheeler's breath, his eyes were bloodshot and watery, he had difficulty walking and maintaining his balance, and his speech was slurred. Similar facts have been sufficient to support a finding of probable cause to arrest a driver for driving while intoxicated. *See Arch v. Director of Revenue,* 186 S.W.3d 477, 480-81 (Mo.App.E.D. 2006). Thus, viewing the situation as it would have appeared to a prudent, cautious, and trained officer, we find that this evidence is sufficient to support the trial court's finding that there was probable cause to arrest Wheeler for driving while intoxicated. Sub-point denied.

In his second sub-point on appeal, Wheeler maintains that the DOR failed to show there was probable cause to arrest him for driving while intoxicated because Officer Koehne did not testify at the trial de novo. Wheeler argues that he had the right to cross-examine Officer Koehne about his reports and his training.

Appendix A

The Sixth Amendment right to confrontation does not apply in a license suspension proceeding. *Krieg v. Director of Revenue,* 39 S.W.3d 574, 576 (Mo.App.E.D. 2001).

Because the right to confrontation does not apply to the proceeding in this case, we find that Wheeler's claim has no merit. Sub-point denied.

Therefore, the trial court did not err in upholding the suspension of Wheeler's driving privileges.

Based on the foregoing, we affirm the judgment of the trial court pursuant to Rule 84.16(b).

Appendix A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED87132

ROBERT J. WHEELER,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Circuit Court of the City of St. Louis

Honorable Elizabeth Byrne Hogan

FILED: July 11, 2006

Before Gary M. Gaertner, Sr., P.J., George W. Draper III, J., and Kenneth M. Romines, J.

PER CURIAM.

ORDER

Appellant, Robert J. Wheeler, appeals from the judgment of the Circuit Court of the City of St. Louis upholding the suspension of his driving privileges. We affirm.

Appendix A

We have reviewed the briefs of the parties and the record on appeal. As an extended opinion would serve no jurisprudential purpose, we affirm the judgment pursuant to Rule 84.16(b). We have, however, provided a memorandum opinion for the use of the parties only setting forth the reasons for our decision.

APPENDIX B — JUDGMENT OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI FILED SEPTEMBER 14, 2005

**IN THE CIRCUIT COURT
OF CITY OF ST. LOUIS, MISSOURI**

496 602099
Mo. License No.

9/14/05
Date

052 7107
Case No.

28
Division

ROBERT J. WHEELER

Petitioner

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Respondent.

JUDGMENT

Case called. Petitioner (appears [in person] by counsel) and Respondent, Director of Revenue (appears by counsel).

* * *

Appendix B

☒ Petitioner announces (ready). Respondent announces (ready) (not ready). Evidence is adduced; case submitted. It is found:

☒ (1) That on 10/24/04 the arresting officer (had) probable cause to arrest Petitioner for driving while intoxicated or an alcohol-related traffic offense; and, that Petitioner (had) a blood alcohol concentration of .08% or more by weight.

☐ (2) That on _____ the Petitioner was less than 21 years of age and the arresting officer (had) (did not have) probable cause to arrest Petitioner for driving while intoxicated or an alcohol-related traffic offense; and, that Petitioner (had) (did not have) a blood alcohol concentration of .08% or more by weight.

☐ (3) That on _____ the Petitioner was less than 21 years of age and was stopped upon probable cause as set forth in Section 302.505 RSMo and the arresting officer (had) (did not have) probable cause to arrest Petitioner for driving while intoxicated or an alcohol-related traffic offense; and, that Petitioner (had) (did not have) a blood alcohol concentration of at least .02% but less than .08% by weight.

☐ OTHER: _____

☒ The relief prayed for in the Petitioner's petition for trial de novo *is denied* and the order of the Director of Revenue suspending/revoking Petitioner's driving privileges is *sustained.* Costs assessed against the Petitioner.

Appendix B

* * * *

s/ [illegible] 9/14/05
JUDGE DATE

APPENDIX C — ORDER OF THE SUPREME COURT OF MISSOURI DATED OCTOBER 31, 2006

IN THE SUPREME COURT OF MISSOURI

SC88021
ED87132

September Session, 2006

(TRANSFER)

Robert J. Wheeler,

Appellant,

vs.

Director of Revenue,

Respondent.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2006, and on the 31st day of October, 2006, in the above-entitled cause.

Appendix C

Given under my hand and seal of said Court, at the City of Jefferson, this 31st day of October, 2006.

s/ [illegible]
Clerk

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 22, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-3917EM

FAYE ANASTASOFF,

Appellant,

V.

UNITED STATES OF AMERICA,

Appellee.

Submitted: May 8, 2000
Filed: August 22, 2000

Before RICHARD S. ARNOLD and GERALD W. HEANEY, Circuit Judges, and PAUL A. MAGNUSON, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of over-paid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for taxes paid on April 15, 1993. The Service denied her claim under 26 U.S.C. § 6511(b), which limits refunds to taxes paid in

the three years prior to the filing of a claim. Although her claim was mailed within this period, it was received and filed on April 16, 1996, three years and one day after she overpaid her taxes, one day late. In many cases, "the Mailbox Rule," 26 U.S.C. § 7502, saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked. But § 7502 applies only to claims that are untimely, and the parties agree that under 26 U.S.C. § 6511(a), which measures the timeliness of the refund claim itself, her claim was received on time. The issue then is whether § 7502 can be applied, for the purposes of § 6511(b)'s three-year refund limitation, to a claim that was timely under § 6511(a). The District Court held that § 7502 could not apply to any part of a timely claim, and granted judgment for the Service. On appeal, Ms. Anastasoff argues that § 7502 should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely. We affirm the judgment of the District Court.

I.

We rejected precisely the same legal argument in *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished). . . .

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article

III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. . . .

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand

the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie.*

II.

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law. In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government. In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and

interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule. . . ." In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to determine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale.

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions. . . ."

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of

adjudication) and the doctrine of precedent implicit in it. Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case. He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law," and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. Like Blackstone, he thought that "the courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. Like Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. Hamilton concludes that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ."

The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk. . . ." But precedents were not to be recorded for their own sake. He expected judges to give them "long and laborious study" and to have a "competent knowledge of them." Likewise, Madison recognized "the obligation arising from judicial expositions of the law on succeeding judges." Madison expected that the accumulation of precedents would be beneficial: "among other difficulties, the exposition of the Constitution is frequently a copious

source, and must continue so until its meaning on all great points shall have been settled by precedents." Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases. Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution.

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum.

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power

itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his Commentaries on the Constitution of the United States §§ 377-78 (1833):

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

Appendix D

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that "unpublished" in this context has never meant "secret." So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled "published" or not, available to anyone on line. This is true of our Court.

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to

create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

Appendix D

IV.

For these reasons, we must reject Ms. Anastasoff's argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in *Christie*. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996), quoting *Payne v. Tennessee*, 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Ms. Anastasoff's interpretation of § 7502 was directly addressed and rejected in *Christie*. Eighth Cir. R. 28A(i) does not free us from our obligation to follow that decision. Accordingly, we affirm the judgment of the District Court.

HEANEY, Circuit Judge, concurring.

I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions. I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our holding in *Christie*, and thus resolve an important issue.

APPENDIX E — STATISTICAL TABLE SHOWING THE MISSOURI SUPREME COURT'S RATE OF REVIEW OF PUBLISHED v. NON-PUBLISHED OPINIONS FROM THE MISSOURI COURT OF APPEALS FOR THE EASTERN DISTRICT PREPARED BY SAMIR KAUSHIK, WASHINGTON UNIVERSITY LAW SCHOOL, CLASS OF 2008

Missouri Supreme Court Decisions Originating from the Eastern District of Missouri (2006)

#	Parties	Mo. Court of Appeals, Eastern District			Mo. Supreme Court	
		Case No.	Date	Published Opinion?	Case No.	Date Citation
1	State v. Davis	ED86313	6/6/2006	Yes	SC87749	12/5/2006 2006 WL 3528511
2	Jones v. Fife	ED86955	6/13/2006	Yes	SC87778	12/5/2006 2006 WL 3528513
3	State v. Graham	ED83794	9/28/2004	Yes	SC87424	11/7/2006 204 S.W.3d 655
4	Snodgras v. Martin & Bayley, Inc.	ED87304	6/27/2006	Yes	SC87841	11/7/2006 204 S.W.3d 638
5	State v. Clark	ED84783	12/6/2005	Yes	SC87473	8/8/2006 197 S.W.3d 598
6	City of Wellston v. SBC Communications, Inc.	ED86916	9/6/2005	Yes	SC87207	8/8/2006 203 S.W.3d 189
7	Bernal v. State	ED83299-01	11/22/2005	Yes	SC87415	6/30/2006 194 S.W.3d 863
8	Powel v. Chaminade College Preparatory, Inc.	ED84366	5/31/2005	Yes	SC86875	6/13/2006 197 S.W.3d 576
9	Davis v. Lambert-St. Louis Intern. Airport	ED85007	8/20/2005	Yes	SC87138	6/13/2006 193 S.W.3d 760
10	Glass v. First Nat. Bank of St. Louis	ED84118	9/13/2005	Yes	SC87244	5/16/2006 191 S.W.3d 662
11	Highfill v. Hale	ED84450	5/24/2005	Yes	SC86987	3/21/2006 186 S.W.3d 277
12	Kunzle v. City of Olivette	ED85119	6/28/2005	Yes	SC87022	2/28/2006 184 S.W.3d 570
13	Hayes v. Show Me Believers, Inc.	ED85433	9/13/2005	No /1	SC87264	5/30/2006 192 S.W.3d 706
14	Hensel v. American Air Network, Inc.	ED85686	11/22/2004	No /1	SC87206	4/25/2006 189 S.W.3d 582
15	State v. McFadden	ED85858	3/7/2006	No /2	SC86857	5/16/2006 191 S.W.3d 648
16	City of St. Louis v. Sprint Spectrum, L.P.	Challenge to Statute /3			SC87400	8/8/2006 203 S.W.3d 199
17	City of University City v. AT&T Wireless Services,	Challenge to Statute /3			SC87208	8/8/2006 203 S.W.3d 197
18	Conseco Finance Servicing Corp. v. Missouri	Challenge to Statute /3			SC87061	6/13/2006 195 S.W.3d 410
19	Edwards v. State	Challenge to Statute /3			SC86895	8/8/2006 200 S.W.3d 500
20	In re R.B.	Challenge to Statute /3			SC86979	3/21/2006 186 S.W.3d 255
21	State ex rel. Hill v. Baldridge	Original Proceeding in Mandamus /3			SC86761	3/21/2006 186 S.W.3d 258
22	State ex rel. Vincent v. Schneider	Original Proceeding in Mandamus /3			SC87203	6/30/2006 194 S.W.3d 853
23	State ex rel. Broadway-Washington Associates,	Original Proceeding in Prohibition /3			SC87121	3/21/2006 186 S.W.3d 272
24	State ex rel. Dean v. Cunningham	Original Proceeding in Prohibition /2			SC86695	1/10/2006 182 S.W.3d 561
25	State ex rel. General Motors Acceptance Corp. v.	Original Proceeding in Prohibition /3			SC86948	1/10/2006 181 S.W.3d 76
26	State ex rel. Kemper v. Vincent	Original Proceeding in Prohibition /3			SC87246	5/16/2006 191 S.W.3d 45
27	State ex rel. Nixon v. Daugherty	Original Proceeding in Prohibition /3			SC87440	2/28/2006 186 S.W.3d 253
28	State ex rel. Tri-County Elec. Co-op. Ass'n v. Dial	Original Proceeding in Prohibition /3			SC87279	5/30/2006 192 S.W.3d 708
29	Anderson v. State	Postconviction Relief /3			SC87060	6/30/2006 196 S.W.3d 28
30	Goodwin v. State	Postconviction Relief /3			SC86278	5/2/2006 191 S.W.3d 20
31	State v. Johnson	Postconviction Relief /3			SC86689	11/7/2006 2006 WL 3218517
32	Stevens v. State	Postconviction Relief /3			SC87885	12/19/2006 unavailable

Notes:

1 Unpublished memorandum decision pursuant to Mo. R. Civ. P. 84.16(b).

2 Unpublished memorandum decision pursuant to Mo. R. Crim. P. 30.25(b).

3 No appellate opinion

Sources: Missouri Public Opinions – Eastern District of Missouri, http://www.courts.mo.gov/Courts/PubOpinions.nsf (last visited January 9th, 2007); Missouri Public Opinions – Supreme Court of Missouri, http://www.courts.mo.gov/Courts/PubOpinions.nsf (last visited January 9th, 2007); Westlaw.

APPENDIX F — EXPLANATION OF METHODOLOGY OF CREATION OF APPENDIX D. PREPARED BY SAMIR KAUSHIK, WASHINGTON UNIVERSITY LAW SCHOOL, CLASS OF 2008

Methodology to Determine Published versus Unpublished Opinions from the Missouri Court of Appeals, Eastern District

1. Retrieved all Missouri Supreme Court Opinions for 2006 (84 total)
    a. Source 1: Missouri Public Opinions – Supreme Court of Missouri, http://www.courts.mo.gov/Courts/PubOpinions.nsf (last visited January 9th, 2007)
    b. Source 2: Westlaw
2. Analyzed each Missouri Supreme Court Opinion to determine
    a. Whether appealed from Missouri Court of Appeals, Eastern District (32 total)
    b. Style of appeal (i.e. opinion, mandamus, prohibition, etc.)
3. For cases appealed from opinions of the Missouri Court of Appeals, Eastern District, determined whether appealed from a published (12 total) or unpublished opinion (3 total)
    a. Source: Missouri Public Opinions – Eastern District of Missouri, http://www.courts.mo.gov/Courts/PubOpinions.nsf (last visited January 9th, 2007)

Methodology to Determine Missouri Court of Appeals, Eastern District Opinion Breakdown

1. Retrieved all Missouri Court of Appeals, Eastern District Opinions for 2006 (908 total)
    a. Source: Missouri Public Opinions – Eastern District of Missouri, http://www.courts.mo.gov/Courts/PubOpinions.nsf (last visited January 9th, 2007)
2. Categorized Missouri Court of Appeals, Eastern District Opinion as Published or Unpublished
    a. Published Opinions (361 total)
    b. Unpublished opinions
        i. Pursuant to Mo. R. Crim. P. 30.25(b) (141 total)
        ii. Pursuant to Mo. R. Civ. P. Rule 84.16(b) (406 total)
3. Determined Percentage of Published Opinions
    a. Divided Total Published Opinions by Total Opinions Produced (39.7%)
4. Determined Percentage of Unpublished Opinions
    a. Divided Total Unpublished Opinions by Total Opinions Produced (60.3%)